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No. 09-451

In the Supreme Court of the United States

TRAVIS SAULSBERRY, ET AL., PETITIONERS

v.

LORRI MYERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL BRIEF OF THE RESPONDENT

MICHAEL J. KING
M. JEAN HOLMES
RONALD M. FRALEY
WINTERS & KING, INC.
2448 East 81st Street
Suite 5900
Tulsa, OK 74137
(918) 494-6868

JOHN P. ELWOOD
Counsel of Record
ROBERT P. BOXIE, III
VINSON & ELKINS LLP
The Willard Office Building
1455 Pennsylvania Avenue, NW, Suite 600
Washington, DC 20004
(202) 639-6518

Counsel for Respondent

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Pursuant to Rule 15.8 of the Rules of this Court, respondent submits this supplemental brief to bring to the Court's attention new authority not available at the time of respondent's last filing. On February 9, 2010, the United States Court of Appeals for the Ninth Circuit issued its opinion on rehearing en banc in *Bull v. City & County of San Francisco*, No. 05-17080, *available at* http://www.ca9.uscourts.gov/datastore/opinions/2010/02/08/05-17080.pdf.

Bull involved a "class action lawsuit challenging * * * on its face" "a policy requiring the strip search of all arrestees who were to be introduced into San Francisco's general jail population for custodial housing." *Bull*, slip op. at 2243. The district court held that the policy violated the Fourth Amendment rights of the persons searched, and a divided panel of the court of appeals affirmed. *Bull v. City & County of San Francisco*, 539 F.3d 1193 (9th Cir. 2008). On rehearing en banc, the court held that "San Francisco's policy requiring strip searches of all arrestees classified for custodial housing in the general population was facially reasonable under the Fourth Amendment, notwithstanding the lack of individualized reasonable suspicion as to the individuals searched." *Bull*, slip op. at 2271.

Bull does not implicate any disagreement among the courts of appeals that is relevant to respondent's circumstances. *Bull*, like *Powell v. Barrett*, 541 F.3d 1298 (11th Cir. 2008) (en banc), concerned strip searches of arrestees before they were introduced into a jail's general population. The Ninth Circuit thus emphasized that "our holding today[] applies *only* to detainees classified to enter the *general corrections facility population*." *Bull*, slip op. at 2268 n.17 (emphasis added). The court's discussion was explicitly limited to searches involving inmates in a jail's "general population." *See id.* at 2243, 2244 (mentioned twice), 2247 (twice), 2250 (twice), 2251, 2252 (three times), 2258, 2260, 2262, 2263 (twice), 2266 (twice), 2267 (four times), 2268 & n.17 (six times), 2271 (twice). It is undisputed that

respondent was never introduced into the LeFlore County Detention Center's general population. Pet. App. 26a.

Moreover, *Bull* emphasized, as our brief in opposition did, Br. in Opp. 11-12 & n.7, that arrestees placed in a jail's general population—where such facilities house the bulk of their inmates, including most of their dangerous prisoners—present vastly different security concerns than persons, such as respondent, temporarily placed in holding cells outside the general population. *Bull* thus cited *Archuleta v. Wagner*, 523 F.3d 1278 (10th Cir. 2008)—a decision of the court whose judgment is under review here—for the proposition that that the "'obvious security concerns inherent in a situation where the detainee will be placed in the general prison population'" are "'simply not apparent'" when arrestees are held temporarily outside the general population. *Bull*, slip op. at 2268 (quoting *Archuleta*, 523 F.3d at 1284). Thus, the en banc court "d[id] not * * * disturb our prior opinions considering searches of arrestees who were not classified for housing in the general jail or prison population." *Id.*

Most significantly here, the court took pains to note (*Bull*, slip op. at 2268-69) that its decision did not disturb *Way v. County of Ventura*, 445 F.3d 1157 (9th Cir. 2006), which held that the Fourth Amendment prohibits "the strip search of an intoxicated arrestee who was detained until sober and never housed with the general jail population." *Bull*, slip op. at 2269. The court emphasized that

San Francisco's strip search policy did not apply to individuals, such as respondent, who were "arrested because of intoxication [and] released when they became sober." *Id.* at 2246, *accord id.* at 2261 ("eligible arrestees who were released * * * upon reaching sobriety * * * were not subject to strip searches"). It is therefore clear that respondent would prevail even under the *Bull* court's new rule. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

MICHAEL J. KING
M. JEAN HOLMES
RONALD M. FRALEY
WINTERS & KING, INC.
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Suite 5900
Tulsa, OK 74137
(918) 494-6868

JOHN P. ELWOOD
ROBERT P. BOXIE, III
VINSON & ELKINS LLP
The Willard Office Building
1455 Pennsylvania Avenue, NW, Suite 600
Washington, DC 20004
(202) 639-6518

Counsel for Respondent

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